submitted covers only the period placed in dispute by commenters.[108] Accordingly, we exercise our discretion in determining whether to accord new factual evidence and arguments that are made on reply any weight, and therefore, we do not strike from the record the portions of reply comments that BellSouth cites in its motion, with the exception of the Intermedia evidence discussed above.[109]

43. Moreover, we disagree with BellSouth that the entire reply comments of CPI and NCTA should be struck, because those parties did not file initial comments.[110] Under our procedures governing BOC applications, a party may file a reply comment to any comment made by any other participant.[111] Parties may not, however, withhold evidence until the reply comments in an attempt to shield the evidence from attack.[112] Thus, although we do not strike these parties' reply comments, we give no weight to evidence and arguments that are not directly responsive to arguments made by other parties in their comments.

44. With respect to AT&T's *ex parte* letter arguing that the Commission should give no weight to new factual evidence and arguments made by BellSouth in its reply comments, we note that BellSouth submits evidence in its reply comments that post-dates the October 20 comment filing date.[113] Because we do not have a motion before us to strike this evidence, however, we do not do so. Nevertheless, consistent with our procedures governing section 271 applications, we give no weight to new evidence that is not directly responsive to another commenter's arguments and that does not cover the period placed in dispute by commenters.[114] Because we do not strike BellSouth's reply comments and because, irrespective of AT&T's letter, we determine whether to accord new evidence any weight in accordance with our procedures governing section 271 applications, we deny BellSouth's Motion to Strike AT&T's Letter.

45. As the Commission stated in the *Ameritech Michigan Order*, these procedures governing section 271 applications are necessary in light of the 90-day statutory time

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[108] *See Ameritech Michigan Order* at paras. 52-54, 59.

[109] *See id.* at para. 59.

[110] *See* BellSouth's Motion to Strike at 6-7.

[111] *Sept. 19th Public Notice* at 7; *Ameritech Michigan Order* at para. 51.

[112] *Ameritech Michigan Order* at para. 52.

[113] *See, e.g.*, BellSouth Stacy Performance Measures Reply Aff., Ex. 2 (providing an aggregate measure for the month of October of the average interval from the time BellSouth's operation support systems accept a competing carrier's order to the time of actual completion of the order); *see also* AT&T Dec. 8 *Ex Parte* at 4-6.

[114] *See supra* para. 42.

deadlines.[115] During the 90-day review period, the Commission has neither the time nor the resources to evaluate a record that is constantly evolving.[116] Moreover, when new information is filed in the reply comments, other parties do not have the same opportunity to comment on the accuracy of the information that they would have if the evidence were raised in an earlier filing.[117] We therefore require the BOC's application to be complete on the day it is filed.[118] We also expect other parties in the proceeding to submit arguments and evidence supporting or opposing the BOC's application in their comments, rather than withholding such information until the reply comments are filed.

V. COMPLIANCE WITH SECTION 271(c)(1)(B)

A. Background

46. In the *SBC Oklahoma Order*, the Commission described the circumstances under which a BOC is permitted to file under section 271(c)(1)(B) and when a BOC is foreclosed from proceeding under section 271(c)(1)(B).[119] In particular, the Commission held that a BOC may not pursue in-region, interLATA entry under section 271(c)(1)(B) if that BOC has received a "qualifying request" for access and interconnection.[120] For purposes of section 271(c)(1)(B), the Commission defined a "qualifying request" as a request for negotiation to obtain access and interconnection that, if implemented, would satisfy the requirements of section 271(c)(1)(A).[121] The Commission further concluded that the "request for access and interconnection must be from an unaffiliated competing provider that seeks to provide the type of telephone exchange service described in section 271(c)(1)(A),"[122] and that the term "competing provider" includes both potential and actual competing providers.[123]

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[115] *Ameritech Michigan Order* at para. 54.

[116] *Id.*

[117] *Id.* at para. 52.

[118] *Sept. 19 Public Notice* at 2-3; *Ameritech Michigan Order* at paras. 50-51.

[119] *SBC Oklahoma Order* at para. 23.

[120] *Id.* at para. 27.

[121] *Id.* at paras. 27, 54.

[122] 47 U.S.C. § 271(c)(1)(A).

[123] *SBC Oklahoma Order* at para. 14.

Moreover, in order for the request to be timely, and therefore foreclose Track B, it must be made at least three months before the BOC's section 271 application is filed.[124]

47. The Commission also noted that pursuant to section 271(c)(1)(B), a BOC,

> shall be considered not to have received any request for access and interconnection if the State commission of such State certifies that the only provider or providers making such a request have (i) failed to negotiate in good faith as required by section 252, or (ii) violated the terms of an agreement approved under section 252 by the provider's failure to comply, within a reasonable period of time, with the implementation schedule contained in such agreement.[125]

As the Commission explained in the *SBC Oklahoma Order*, these exceptions are designed to ensure that, after a request for access and interconnection, Track B would become available to the BOC if facilities-based competition does not emerge because the potential competitor fails either to bargain in good faith or to implement its interconnection agreement according to a negotiated or arbitrated schedule.[126]

48. The Commission also recognized that in some circumstances there may be a basis for revisiting its decision that, because there has been a qualifying request, Track B is foreclosed in a particular state.[127] The Commission found that if, following a determination that Track B is foreclosed, a BOC refiles its section 271 application, the Commission may reevaluate whether a BOC is entitled to proceed under Track B "in the event relevant facts demonstrate that none of its potential competitors is taking reasonable steps toward implementing its request in a fashion that will satisfy section 271(c)(1)(A)."[128] By adopting such a standard, the Commission intended to ensure that potential competitors will not be permitted "to delay indefinitely BOC entry by failing to provide the type of telephone exchange service described in Track A."[129]

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[124] 47 U.S.C. § 271(c)(1)(B). Thus, because BellSouth's section 271 application was filed on September 30, 1997, a qualifying request in the instant proceeding is timely if it was made "before the date which is 3 months before" BellSouth's section 271 application was filed, *i.e.*, June 30, 1997.

[125] *SBC Oklahoma Order* at para. 31 (quoting 47 U.S.C. § 271(c)(1)(B)).

[126] *Id.* at para. 37.

[127] *Id.* at para. 58.

[128] *Id.*

[129] *Id.* at paras. 55, 58.

B. Evidence in the Record

49. In its application, BellSouth submits that it is eligible to apply for in-region, interLATA authorization in South Carolina pursuant to Track B on the grounds that it has an approved SGAT and, through no fault of BellSouth, no potential competitors are taking reasonable steps toward providing facilities-based service to residential and business customers.[130]

50. BellSouth states that it has executed interconnection and/or resale agreements with 83 different telecommunications carriers in South Carolina, and the South Carolina Commission has approved 67 of these agreements.[131] In addition, BellSouth contends that it has "actively invited entry" by competing LECs by offering interconnection and network access through its SGAT.[132] BellSouth further submits that, despite its efforts, no competing LEC has "made any significant, timely effort to provide the sort of facilities-based competition" intended by the 1996 Act.[133]

51. According to BellSouth, because information held by its competitors may demonstrate that BellSouth has satisfied the requirements of section 271(c)(1)(A), the Commission, during the pendency of its review of BellSouth's section 271 application, should conduct an inquiry into the status of local competition in South Carolina and require commenters to give "specific details regarding their telephone exchange service operations."[134] BellSouth contends that, if the evidence in the record reveals the existence of a competing provider of the type of telephone exchange service described in section 271(c)(1)(A), then it is eligible to proceed under section 271(c)(1)(A) and section 271(c)(1)(B).[135] BellSouth further maintains that, "[i]f the evidence shows that a [competing LEC] has begun supplementing facilities-based service to business customers with resale of BellSouth's residential service in

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[130] BellSouth Application at 4-5.

[131] *Id.* at 5.

[132] *Id.* at 6-7. As noted above, BellSouth's SGAT was approved, with modifications, by the South Carolina Commission on July 31, 1997. The South Carolina Commission approved further modifications to BellSouth's SGAT on September 9, 1997. *See id.* at 7-8.

[133] *Id.* at 8.

[134] *Id.* at 16. BellSouth does not suggest that the Commission toll the statutory 90-day period while the Commission conduct such an inquiry.

[135] *Id.* at 16-17.

South Carolina, BellSouth would be eligible for interLATA relief under both Track A and Track B."[136]

52. BellSouth asserts that a BOC is eligible to proceed under Track B unless a potential facilities-based competitor has made a timely request for interconnection and access from BellSouth in South Carolina that, if implemented, will lead to the type of telephone exchange service described in section 271(c)(1)(A) and is taking reasonable steps toward implementing that request in a fashion that satisfies the requirements of section 271(c)(1)(A).[137] Moreover, according to BellSouth, in deciding whether requesting carriers are taking reasonable steps toward providing facilities-based service to residential and business customers, the Commission may only consider the state of local competition as of three months before the date a BOC's application for in-region, interLATA authorization was filed, or in this case, before June 30, 1997.[138] BellSouth maintains that "Congress established this cut-off date to 'ensure' the [BOCs'] ability to file Track B applications when facilities-based competition is not developing despite an open market."[139] BellSouth concludes that, because no potential competitors are taking reasonable steps to satisfy the requirements of section 271(c)(1)(A), it is eligible to proceed under Track B.[140]

53. In evaluating BellSouth's compliance with the requirements of section 271(c), the South Carolina Commission maintains that it considered the business plans "of those companies seeking to provide local dialtone service in South Carolina."[141] Based upon this

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[136] *Id.* In support of its contention that Track A may be satisfied in this manner, BellSouth points out that "[t]he Department of Justice has explained that the Act does not require . . . that each class of customers (i.e., business and residential) must be served over a facilities-based competitor's own facilities. It does not matter whether the competitor reaches one class of customers -- e.g., residential -- only through resale, provided the competitor's local exchange services as a whole are provided 'predominately' over its own facilities." *Id.* at 17 (quoting Department of Justice SBC Oklahoma Evaluation at 3).

[137] *Id.* at 10.

[138] *Id.* at 10-11.

[139] *Id.* (citing Joint Explanatory Statement at 148).

[140] *Id.* at 12 (citing *South Carolina Commission Compliance Order* at 19).

[141] South Carolina Commission Comments at 5 (citing *South Carolina Commission Compliance Order* at 19). We note that MCI filed a petition before the South Carolina Commission requesting a declaratory ruling that BellSouth is ineligible to proceed under Track B. In its response to this petition, BellSouth argued that "the availability of Track A or Track B is a decision that has been delegated to the FCC." BellSouth Application, App. C, Vol. 1, Tab 21, BellSouth Brief in Response, South Carolina Commission Docket No. 97-101-C (May 19, 1997), at 18. The South Carolina Commission agreed with BellSouth and in a July 7, 1997 order held that the "final decision on the applicability of either Track should be deferred to the FCC, since Federal law is involved in this issue." BellSouth Application, App. C, Vol. 3, Tab 57, *South Carolina Commission, Order Denying MCI's Petition for Rehearing or Reconsideration*, Docket No. 97-101-C, Order No. 97-575 (July 7,

information, the South Carolina Commission found that "none of BellSouth's potential competitors are taking reasonable steps toward implementing any business plan for facilities-based local service."[142] The South Carolina Commission further maintains that it is unaware of any actual facilities-based service to residential and business customers in South Carolina.

54. Opponents of BellSouth's application assert that BellSouth has received "qualifying requests" for access and interconnection for the type of telephone exchange service described in section 271(c)(1)(A) and that BellSouth, therefore, is foreclosed from proceeding under Track B.[143] Similarly, the South Carolina Consumer Advocate maintains that BellSouth should not be allowed to proceed under Track B because several carriers have taken steps to provide local service and that these steps have been reasonable in light of the uncertainties caused by the lack of "permanent rates" for interconnection and unbundled network elements.[144] Although AT&T contends that "BellSouth's non-compliance with its checklist obligations is so pervasive and damaging to local competition" in South Carolina that there is no need for the Commission to consider whether BellSouth may proceed under section 271(c)(1)(B), it asserts that if the Commission does reach the issue it should find that AT&T has made qualifying request that forecloses Track B.[145] Ameritech and U S WEST, in contrast, agree with BellSouth's contention that its application may proceed under Track B on the basis that no competing provider is taking reasonable steps to provide facilities-based residential and business telephone exchange service in South Carolina.[146]

55. ALTS, MCI, and WorldCom dispute BellSouth's assertion that the Commission may not consider any reasonable steps taken after June 30, 1997, in its analysis of whether a potential competitor has made a qualifying request.[147] Rather, these commenters assert that the Commission may consider all the available evidence, including events occurring before and after June 30, 1997, in deciding whether any potential competitors are taking reasonable

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1997) (*South Carolina Commission July 7, 1997 Order*). In that proceeding, MCI had requested the South Carolina Commission to reconsider its position with regard to the availability of Track B in light of the Commission's decision in the *SBC Oklahoma Order*. *Id.*

[142] South Carolina Commission Comments at 5 (citing *South Carolina Commission Compliance Order* at 19).

[143] *See, e.g.*, ACSI Comments at 12, 13-16; ALTS Comments at 7-9; AT&T Comments at 50; CompTel Comments at 7; Intermedia Comments at 6-7; MCI Comments at 5-7; Sprint Comments at 33; TCG Comments at 6; TRA Comments at 17-18; Vanguard Cellular Comments at 8-9; South Carolina Consumer Advocate Comments at 3.

[144] South Carolina Consumer Advocate Comments at 3-5, 7.

[145] AT&T Comments at 48, 50; *see also* Sprint Comments at 33.

[146] Ameritech Comments at 4-5; U S WEST Comments at 3, 8-12.

[147] ALTS Comments at 6; MCI Comments at 6; WorldCom Comments at 21.

steps to provide facilities-based service to residential and business customers in South Carolina.[148] U S WEST, on the other hand, concurs with BellSouth's contention that, in deciding whether requesting carriers are reasonably proceeding toward facilities-based service to residential and business customers, the Commission must look only to the state of local competition as of three months before BellSouth's section 271 application was filed.[149]

56. As to BellSouth's eligibility to proceed under Track A, the Department of Justice contends that there is no evidence in BellSouth's application or elsewhere in the record that BellSouth is providing access and interconnection to an operational competing provider of the type of telephone exchange service described in section 271(c)(1)(A).[150] Moreover, the Department of Justice maintains that the record available at the time of its evaluation did not contain sufficient evidence of whether BellSouth had received a qualifying request.[151] The Department of Justice asserts, therefore, that it is unable to determine BellSouth's eligibility to proceed under Track B.[152] The Department of Justice does submit, however, that a conclusion that a BOC had received a qualifying request would not be warranted unless the requesting carrier intends to provide the type of telephone exchange service described in section 271(c)(1)(A) "within a specified and reasonable time frame."[153]

C. Discussion

1. Section 271(c)(1)(A)

57. BellSouth has failed to demonstrate that it is providing access and interconnection to an unaffiliated, facilities-based competing provider of telephone exchange service to residential and business subscribers. Although, on reply, BellSouth contends that MCI's "provision" of telephone exchange service on a test basis, at no charge, to the homes of 19 MCI employees,[154] qualifies MCI as a competing provider under section 271(c)(1)(A), the

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[148] WorldCom Comments at 21; *see also* ALTS Comments at 6; MCI Comments at 6.

[149] U S WEST Comments at 7.

[150] Department of Justice Evaluation at 12.

[151] *Id.* at 10-11.

[152] *Id.* at 12.

[153] *Id.* at 10. Absent a showing of this kind, the Department of Justice maintains that "a BOC's ability to use Track B could be foreclosed indefinitely by the inaction of its competitors, contrary to the purpose of Track B." *Id.* (citing *SBC Oklahoma Order* at paras. 54-56).

[154] *See* BellSouth Reply Comments at 21-22 (asserting that MCI's provision of facilities-based service to residential customers in combination with ACSI's provision of competitive access services to business customers enables it to satisfy the requirements of section 271(c)(1)(A)). *But see* Letter from Kimberly M. Kirby, MCI, to

Commission has expressly rejected the view that such a trial offering is sufficient for these purposes.[155] In the *SBC Oklahoma Order,* the Commission concluded that the terms "subscribers" and "telephone exchange service," as used in section 271(c)(1)(A), require that the persons receiving the service pay a fee.[156] Moreover, the Commission held that "for the purposes of section 271(c)(1)(A), the *competing* provider must actually be in the market, and, therefore, beyond the testing phase."[157] Consistent with the precedent established in the *SBC Oklahoma Order,* we find that MCI is not an operational competing provider of the type of telephone exchange service described in section 271(c)(1)(A). We, therefore, conclude that BellSouth has not satisfied the requirements of section 271(c)(1)(A). In reaching this conclusion, we decline BellSouth's invitation to conduct an inquiry into the status of local competition in South Carolina in order to determine whether competing carriers are, in fact, providing the type of service described in section 271(c)(1)(A).[158] As the Commission found in the *Ameritech Michigan Order*, "the ultimate burden of proof with respect to factual issues remains at all times *with the BOC.*"[159]

2. Section 271(c)(1)(B)

a. Summary

58. For the reasons set forth below, we find that BellSouth is ineligible to proceed under Track B because it has failed to meet its burden of demonstrating that it has received no requests for access and interconnection that, if implemented, would satisfy the requirements of section 271(c)(1)(A). As an initial matter, we clarify our standard for evaluating qualifying requests and the role of reasonable steps in our evaluation.

b. Standard for Evaluating Qualifying Requests

59. Section 271(c)(1)(B) provides that a "[BOC] meets the requirements of [section 271(c)(1)(B)] if . . . no such provider *has requested the access and interconnection* described in [section 271(c)(1)(A)] before the date which is 3 months before the date the company

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William F. Caton, Acting Secretary, FCC, Oct. 16, 1997 (stating that MCI has placed 19 trial orders for residential service in South Carolina for MCI employees via resale and/or loop/port combination).

[155] *See SBC Oklahoma Order* at para. 17 (concluding that Brooks' provision of local exchange service on a test basis, at no charge, to the homes of four of its employees does not qualify Brooks as a section 271(c)(1)(A) carrier).

[156] *See id.*

[157] *Id.* (emphasis in original).

[158] *See* BellSouth Application at 16.

[159] *Ameritech Michigan Order* at para. 43 (emphasis added).

makes its application under [section 271(d)(1)]."[160] Once the Commission has found that a request for access and interconnection was made more than three months prior to the filing of a section 271 application, it must next determine whether such request is for the type of access and interconnection described in section 271(c)(1)(A), *i.e.*, a qualifying request.

60. Because, however, it may not be apparent from the face of a request whether it is qualifying, the Commission may be required to engage in a predictive judgment to determine whether the request, if implemented, will lead to the type of telephone exchange service described in section 271(c)(1)(A).[161] In determining whether a request for access to unbundled network elements and interconnection is a qualifying request, therefore, the Commission will consider various types of evidence in the record that may inform its determination. For example, the Commission could consider, among other things, preliminary discussions and correspondence between the BOC and the requesting carrier that may pre-date or post-date a specific request. The Commission would also attach particular weight to any negotiated or arbitrated agreement between the BOC and the requesting carrier. Thus, if a potential competitor makes a request for access and interconnection and the competitor subsequently negotiates an interconnection agreement that provides facilities for the requesting carrier to serve residential and business customers, that interconnection agreement could be considered probative evidence that the request for access and interconnection was, in fact, a qualifying request.

61. BellSouth claims that the Commission held in the *SBC Oklahoma Order* that a qualifying request will not foreclose Track B unless a carrier takes "reasonable steps" toward implementing that request. The Commission's statement concerning the relevance of "reasonable steps" taken by a requesting carrier toward the provision of the type of telephone exchange service described in section 271(c)(1)(A), however, was made in a different context. In that decision, the Commission found that SBC had received qualifying requests for access and interconnection that foreclosed SBC from proceeding under Track B. Since SBC also failed to demonstrate that its application satisfied the requirements of section 271(c)(1)(A), the Commission denied its application for in-region, interLATA authority. The Commission observed, however, that its finding regarding SBC's receipt of qualifying requests, which foreclosed Track B, was not immutable. Specifically, the Commission held out the possibility that, when SBC files a new application for Oklahoma, SBC might be able to show that the carriers that had submitted qualifying requests at the time of its initial application have not taken "reasonable steps" toward reducing those requests to agreements or otherwise have not progressed toward the provision of the type of telephone exchange service described in section 271(c)(1)(A). Thus, in the event relevant facts demonstrate that no requesting carrier has taken reasonable steps to implement a request for access and interconnection in the

[160] 47 U.S.C. § 271(c)(1)(B) (emphasis added).

[161] *SBC Oklahoma Order* at para. 57.

intervening period between an initial and subsequent section 271 application, the Commission stated that it may "reevaluate whether [the BOC] is entitled to proceed under Track B."[162]

62. In this case, BellSouth contends that the Commission should consider whether a requesting carrier has taken "reasonable steps" toward implementing its request for access and interconnection in a fashion that will satisfy the requirements of section 271(c)(1)(A) in determining whether the BOC is foreclosed from proceeding under Track B.[163] To the extent BellSouth argues that certain reasonable steps are *required* before a request for access and interconnection can foreclose Track B, we disagree.[164] Rather, we find that a request can be qualifying by its terms and need not be accompanied by reasonable steps.

63. In the *SBC Oklahoma Order*, the Commission indicated that, in assessing whether there has been a request for access and interconnection that would foreclose Track B, the Commission would have to engage in a difficult predictive judgment regarding whether the request will lead to the type of telephone exchange service described in subsection 271(c)(1)(A).[165] The Commission has now engaged in this difficult predictive judgment on two occasions, namely, the *SBC Oklahoma Order* and the instant one. The Commission, and the parties, have devoted enormous resources to informing and making this judgment, notwithstanding the fact that section 271(c)(1)(A) and section 271(c)(1)(B) are essentially threshold questions that we must consider before assessing whether the BOC has satisfied the items of the competitive checklist and the other requirements of section 271(d)(3). The Commission developed the "qualifying request" framework in the *SBC Oklahoma Order* as a method of giving effect to the language in section 271(c)(1)(B) specifying that Track B is foreclosed as soon as there is a "request" for the type of telephone exchange service described in section 271(c)(1)(A), rather than foreclosing Track B only if the request or requests for interconnection are made by carriers that are already predominately facilities-based and already serving residential and business customers.[166] In addition, the Commission developed the "reasonable steps" framework so that new entrants would not be able to preclude BOC entry indefinitely by making a qualifying request for access and interconnection and then not completing the work necessary to provide the type of telephone exchange service described in section 271(c)(1)(A).[167]

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[162] *SBC Oklahoma Order* at para. 58.

[163] BellSouth Application at 10.

[164] Rather, as the Commission held in the *SBC Oklahoma Order*, Track B is foreclosed to the BOC once it has received a qualifying request. *See SBC Oklahoma Order* at paras. 23, 27, 54.

[165] *SBC Oklahoma Order* at para. 57.

[166] *See SBC Oklahoma Order* at paras. 54-56.

[167] *SBC Oklahoma Order* at para. 54.

64. Upon further reflection, we observe that there may be other more efficient ways of assessing requests for access and interconnection for purposes of Track B, while preventing new entrants from relying on bare requests to preclude BOC entry. Notwithstanding the Commission's dicta in the *SBC Oklahoma Order* concerning "reasonable steps," the statute expressly empowers state commissions to nullify the foreclosure of Track B that occurs when a timely, qualifying request has been made[168] in two situations. Specifically, a BOC will not be deemed to have received a qualifying request if the applicable state commission "certifies that the only provider or providers making such a request have (i) failed to negotiate in good faith . . . or (ii) violated the terms or an agreement . . . by the provider's failure to comply, within a reasonable period of time, with the implementation schedule contained in such agreement."[169] With respect to the latter exception, we note that nothing in the Commission's rules precludes incumbent LECs, including BOCs, from negotiating, or states from imposing in arbitration, schedules for the implementation of the terms and conditions by the parties to the agreement. For instance, section 252(c)(3) provides that in "resolving by arbitration under [section 252 (b)] any open issues and imposing conditions upon the parties to the agreement, a State commission shall . . . provide a schedule for implementation of the terms and conditions by the parties to the agreement."[170] We would be prepared to give such certifications conclusive effect so long as they are consistent with the statute. We intend to offer more specific guidance as to the scope and form of such certifications in a future proceeding.[171]

c. Existence of "Qualifying Requests" in South Carolina

65. As noted above, Track B is available to BellSouth if no potential facilities-based provider of the type of telephone exchange service described in section 271(c)(1)(A) requested access and interconnection to BellSouth's network prior to June 30, 1997. In its application, BellSouth submits that, as of September 19, 1997, it had signed local exchange interconnection and/or resale agreements with eighty-three different telecommunications

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[168] 47 U.S.C. § 271(c)(1)(B).

[169] *Id.*

[170] 47 U.S.C. § 252(c)(3).

[171] Notably, the only arbitrated interconnection agreement in South Carolina, the AT&T/BellSouth agreement, contains no implementation schedule, and the South Carolina Commission's order approving the arbitrated agreement fails to require one. As the South Carolina Consumer Advocate observes, BellSouth and the South Carolina Commission "are in no position to assert failure to act on the part of [BellSouth's] competitors when neither utilized [the provisions of section 252(c)(3)]" to obtain or require an implementation schedule. South Carolina Consumer Advocate Comments at 3.

carriers in South Carolina.[172] BellSouth maintains that twenty-six of these carriers indicated in their interconnection negotiations that they may provide "competitive local exchange services in whole or in part over their facility-based networks."[173] Moreover, BellSouth asserts that these twenty-six carriers signed interconnection agreements that include "terms and conditions for local exchange interconnection and the unbundling of [BellSouth] network elements."[174] BellSouth further states that nine of these carriers, ACSI, AT&T, DeltaCom, FiberSouth, Hart Communications, Intermedia, KMC, MCI and US LEC, have received, or in the process of receiving, certification from the South Carolina Commission to provide local exchange services in South Carolina.[175] Notably, BellSouth identifies three carriers, ACSI, DeltaCom, and Time Warner, as having "sufficient distribution facilities currently in place to support the general delivery of facility-based local exchange services."[176] BellSouth does not claim that any of these twenty-six requests, which have resulted in signed interconnection agreements, were made after the commencement of the three-month window. We find, therefore, that each of these requests was made "before the date which is 3 months before" BellSouth filed its section 271 application, and, therefore, falls within the statutory period in which a request can preclude a Track B application.[177]

66. As the Commission held in the *SBC Oklahoma Order*, in order to satisfy the requirements of section 271(c)(1)(B), BellSouth must demonstrate that none of the timely

[172] BellSouth Wright Aff. at para. 6 & Attach. WPE-A at 2. The South Carolina Commission has approved BellSouth's agreements with 67 of these providers. BellSouth Application at 5-6 n.4. BellSouth further states that it is in negotiations with 71 additional companies "which may possibly result in South Carolina agreements in the future." BellSouth Wright Aff. at para. 6. BellSouth provides no further information on the nature of the requests made by these 71 carriers. We note, however, that at least 30 of these requests were made prior to the commencement of the three-month window. *Id.*, Attach. WPE-F at 1-2.

[173] BellSouth Wright Aff. at para. 6. As explained by BellSouth, the 26 potential facilities-based competing providers in South Carolina are: ACSI, ALEC, Inc., American MetroComm, AT&T, AXSYS Inc., Business Telecom, Communications Brokerage Services, Competitive Communications, Inc. (CCI), Comm Depot, Cybernet Group, ITC DeltaCom (DeltaCom), FiberSouth, GNET, Hart Communications, Intermedia, IntelCom Group, Interstate Telephone, Kamine Multimedia Corp (KMC), MCI, National Telephone, Southeast Telephone, Teleport Communications Group (TCG), Time Warner Communications (Time Warner), Tricomm, US LEC, and Winstar Communications. *Id.*

[174] *Id.* at para. 6. We note that, as of September 19, 1997, 22 of these interconnection agreements had been approved by the South Carolina Commission. BellSouth Wright Aff., Attach. WPE-A at 2.

[175] *Id.* at para. 7.

[176] BellSouth Wright Aff. at para. 25.

[177] 47 U.S.C. § 271(c)(1)(B).

requests for access and interconnection it has received are qualifying requests.[178] Instead of presenting evidence to support such a finding, BellSouth asserts that it is entitled to proceed under Track B because no requesting carrier is taking "reasonable steps" to provide the type of telephone exchange service described in section 271(c)(1)(A) to residential and business subscribers.[179] In support of this contention, BellSouth provides detailed information on three carriers with "self-provided" facilities in South Carolina that have signed interconnection agreements.[180] BellSouth, however, provides little or no information on the other twenty-three carriers with signed interconnection agreements or the carriers that have made timely requests for access and interconnection but have not yet obtained interconnection agreements.[181] In addition, BellSouth dismisses the requests of major interexchange carriers, such as AT&T, MCI, and Sprint by simply asserting that "the general lack of commitment demonstrated by these potential facility-based providers in serving the local exchange market has led [BellSouth] to discount any possibility of their facility-based entry in South Carolina in the foreseeable future."[182]

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[178] *See SBC Oklahoma Order* at paras. 27, 60-64; CPI Reply Comments at 4 (stating that "in determining whether Track B is applicable, BellSouth must allege and demonstrate, and the Commission must find, that *none* of the 83 to 154 requests that have been submitted to BellSouth in South Carolina are qualifying requests"); CompTel Reply Comments at 4-7; NCTA Reply Comments at 6.

[179] Although BellSouth claims that the South Carolina Commission "certified" that none of BellSouth's potential competitors is taking any reasonable steps towards implementing its request in a fashion that satisfies the requirements of section 271(c)(1)(A), we do not find that such certification is required pursuant to section 271(c)(1)(B). *See* BellSouth Application at 3. Rather, section 271(c)(1)(B) provides that the relevant state commission may certify that a potential competitor either failed to negotiate in good faith or failed to comply, "within a reasonable time," with an *implementation schedule* contained in an interconnection agreement. 47 U.S.C. § 271(c)(1)(B). BellSouth does not allege, nor did the South Carolina Commission certify, that either of these exceptions is applicable here. Indeed, it does not appear that any of the interconnection agreements in the instant proceeding contain implementation schedules. Thus, to the extent that BellSouth characterizes the South Carolina Commission's statement as a "certification" pursuant to section 271(c)(1)(B), we find that such reliance is misplaced. Indeed, in a July 7, 1997 order, the South Carolina Commission stated that it did not address BellSouth's eligibility to pursue in-region, interLATA entry under either Track A or Track B, concluding that "the final decision on the applicability of either Track A or Track B should be deferred to [the Commission], since Federal law is involved in this issue." *South Carolina Commission July 7, 1997 Order* at 1.

[180] Notably, although the Commission held in the *Ameritech Michigan Order* that the use of unbundled network elements constitutes a competing carrier's "own facilities" for purposes of satisfying the requirements of section 271(c)(1)(A), BellSouth did not discuss any carriers, such as AT&T, whose strategy for entry into the local telecommunications market in South Carolina included the use of combinations of unbundled network elements. *See Ameritech Michigan Order* at para. 101.

[181] The Commission has never held that a carrier must obtain an interconnection agreement in order to have made a qualifying request for access and interconnection that forecloses Track B.

[182] Wright Aff. at para. 25. Consequently, BellSouth included only a cursory discussion of these carriers in its application. Further, BellSouth maintains that the South Carolina Commission "has confirmed that [competing carriers'] failure to move more quickly to launch facilities-based local service -- particularly for residential customers -- is due *solely* to their own business decisions" and that "BellSouth has not taken any

67. We find that BellSouth has failed to substantiate its contention that it has not received a qualifying request. Generalized assertions that no potential competitors are taking "reasonable steps" are insufficient to allow a BOC to proceed under Track B. Specifically, BellSouth does not discuss in any detail the remaining twenty-three requesting carriers with signed interconnection agreements or the other carriers that have made timely requests but are still in the process of negotiation. We conclude, therefore, that BellSouth has not satisfied its burden of demonstrating that it is eligible to proceed under Track B. Because we do not rely on actions taken by any requesting carrier after June 30, 1997, in reaching this conclusion, we find that the application of BellSouth's proposed "three-month" rule would have no practical impact on the instant proceeding. We need not, therefore, address it here.

68. Before turning to the competitive checklist issues, we review AT&T's experience in South Carolina. Although AT&T formally requested access and interconnection in June 1996, we find it relevant that AT&T first expressed its intention to serve residential and business customers in BellSouth's region through a combination of BellSouth's network elements soon after the passage of the 1996 Act. For example, on February 29, 1996, AT&T requested approval from the South Carolina Commission to offer local exchange services throughout South Carolina.[183] Shortly thereafter, in March 1996, AT&T began informally to negotiate an interconnection agreement with BellSouth.[184] During these preliminary negotiations, on March 28, 1996, AT&T informed BellSouth of its intent to use unbundled network elements, including combinations of network elements, to provide "all the network capabilities and functions needed to offer residential and business customers a wide array of basic exchange services."[185] According to AT&T, this statement "confirmed and amplified [its] intention to serve residential and business customers throughout [BellSouth's] region using unbundled network elements, resale, and interconnection."[186] In November 1996, when it was unable to reach a negotiated interconnection agreement with BellSouth, AT&T requested arbitration before the South Carolina Commission pursuant to section 252.[187]

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action to prevent or retard the development of local competition in South Carolina." BellSouth Application at 14 (citing *South Carolina Commission Compliance Order* at 20).

[183] AT&T Carroll Aff. at para. 12.

[184] *Id.*

[185] *Id.* at para. 14.

[186] AT&T Comments at 50 (citing AT&T Carroll Aff. at paras. 14, 16-17).

[187] BellSouth Application, App. B, Vol. 8, Tab. 69, South Carolina Commission, Order on Arbitration, Docket No. 96-358-C, Order No. 97-189, at 1 (Mar. 10, 1997) (*Arbitration Order*).

69. On March 10, 1997, the South Carolina Commission issued its ruling on the arbitration.[188] The arbitrated interconnection agreement, which became effective on June 2, 1997, provides in pertinent part:

> AT&T may purchase unbundled Network Elements for the purpose of combining Network Elements, whether those elements are its own or are purchased from BellSouth, in any manner that it chooses to provide service. If Network Elements are rebundled to produce an existing tariffed retail service, the appropriate price to be charged to AT&T by BellSouth is the wholesale price (discounted retail price).[189]

We note that this provision of the arbitrated agreement is in violation of the Commission's rules (promulgated in August 1996 and, subsequently, affirmed by the Eighth Circuit in July 1997) that a competing carrier may provide local exchange services solely through the use of network elements and may obtain these elements at cost-based rates.[190] We also note that it is not apparent from this language whether AT&T can require BellSouth to combine the elements or whether BellSouth will disconnect already combined elements and require AT&T to recombine them. Until the Eighth Circuit issued its decision on rehearing on October 14, 1997, the Commission's rules barred BellSouth from separating elements already combined in its network.[191]

70. Although the Eighth Circuit *Rehearing Order* held that incumbent LECs have no duty to do the actual combining of network elements themselves, it did not alter the right of competing carriers to provide a telecommunications service solely through the use of unbundled network elements at cost-based rates. Notwithstanding this right, if AT&T sought to combine the elements itself and thereby provide a service that replicates an existing retail service, an entry strategy specifically ratified by the Eighth Circuit,[192] it is precluded from doing so at cost-based rates under its arbitrated interconnection agreement. Moreover, AT&T cites a letter from BellSouth dated September 12, 1997, in which BellSouth states that "when AT&T orders a combination of network elements or orders individual network elements that,

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[188] *Id.*

[189] BellSouth Application, App. B, Vol. 8, Tab 69, Agreement Between BellSouth Telecommunications, Inc. and AT&T Communications of the Southern States, Inc. § 1.A (June 2, 1997) (BellSouth-AT&T Interconnection Agreement).

[190] *Local Competition Order*, 11 FCC Rcd at 15646-49; *Iowa Utils. Bd.*, 120 F.3d at 814-15.

[191] *See* 47 C.F.R. § 51.315(b) (vacated by *Iowa Utils. Bd., Rehearing Order*).

[192] *Iowa Utils. Bd.*, 120 F.3d at 814-15.

when combined, duplicate a retail service provided by BellSouth, BellSouth will treat, for purposes of billing and provisioning, that order as one for resale."[193]

71. It appears, therefore, that if AT&T seeks to provide service to residential and business customers solely through the use of unbundled network elements -- which would qualify as the type of telephone exchange service described in section 271(c)(1)(A) -- AT&T would either have to renegotiate its interconnection agreement with BellSouth or replace its agreement with the terms of BellSouth's revised SGAT,[194] which now allows a competing carrier to use combinations of network elements, at cost-based rates, when a carrier combines the elements itself to provide a service that duplicates an existing BellSouth tariffed service.[195] Thus, AT&T is faced with the choice of either starting the negotiation process all over again, and further delaying its entry into the local market, or losing all the benefits of its arbitrated agreement by accepting the terms of the SGAT. We note that even if AT&T could surmount this hurdle and obtain the right to purchase combinations of network elements at cost-based rates, we conclude in this Order that BellSouth has not demonstrated that it can provide nondiscriminatory access to unbundled network elements in a manner that allows competing carriers to combine them to provide a telecommunications service.[196]

72. AT&T states that it has "attempted repeatedly to get BellSouth executives to change this [recombination] policy or at a minimum put it aside so that [both AT&T and BellSouth] could move forward with implementation details."[197] AT&T also maintains that, in those states in BellSouth's region where combinations of network elements were available at cost-based prices, AT&T has sought to implement its request, for example, by testing the

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[193] AT&T Carroll Aff. at para. 24 (quoting Letter from Mark Feidler, President -- Interconnection Services, BellSouth Telecommunications, Inc. to W.J. Carroll, Vice President, AT&T Communications, Inc. (Sept. 12, 1997)).

[194] We note that the SGAT was not revised until September 1997. Prior to that time, the SGAT contained restrictions on the use of unbundled network elements similar to that contained in AT&T's arbitration agreement.

[195] For example, after the Eighth Circuit's July 1997 ruling which vacated the Commission's rule implementing section 252(i), competing carriers may not "pick and choose" from individual sections of another interconnection agreement or an SGAT and then insert such sections into their own interconnection agreements. *See Iowa Utils. Bd.*, 120 F.3d at 800-01. Thus, in order for AT&T to avail itself of any of the terms in the SGAT, it would have to replace its entire interconnection agreement with the SGAT.

[196] We also note that AT&T's arbitration agreement, and the original SGAT, provided that vertical features of the switch are retail services, not unbundled network elements. BellSouth/AT&T Interconnection Agreement at 55. This violates the Commission's rule, upheld by the Eighth Circuit, that vertical features are network elements. *See* 47 C.F.R. § 51.319(c)(1)(C); *Iowa Utils. Bd.*, 120 F.3d at 808-09. After the Commission's rule was upheld by the Eighth Circuit, BellSouth submitted a revised SGAT that provides that vertical features are unbundled network elements. SGAT, Attach. C at 7-8.

[197] AT&T Carroll Aff. at para. 25.

provision of unbundled network element combinations.[198] AT&T argues, however, that BellSouth has resisted these efforts. BellSouth responds that it is willing to engage in such implementation efforts, but BellSouth does not dispute that, in these states, AT&T is making such efforts.[199]

73. Because of these circumstances, AT&T contends that BellSouth has hindered its ability to begin providing local exchange services in South Carolina.[200] More specifically, AT&T submits that BellSouth has refused to allow AT&T to pursue its entry strategy of providing local service through combinations of unbundled network elements. AT&T states that "had BellSouth responded constructively to AT&T's request for [unbundled network element]-based entry under the law as applicable throughout the relevant time period, AT&T would have been able to provide 'the type of telephone exchange service described in section 271(c)(1)(A).'"[201]

74. On reply, AT&T reiterates that it has sought from the outset of its negotiations with BellSouth the ability to provide local service to business and residential customers with a combination of BellSouth's network elements.[202] It also asserts that "if unbundled network elements were truly available on nondiscriminatory terms and conditions and priced at cost as the Act requires -- AT&T would rely upon unbundled network elements, in conjunction with its own facilities, to serve at least the majority of its residential and business customers . . . service that this Commission would deem to be predominantly facilities-based to both residential and business customers."[203] AT&T maintains, however, that it is not in a position to say when it will provide such unbundled network element-based service in South Carolina given the"'great uncertainty' concerning whether and when BellSouth will make unbundled network elements available to AT&T at cost-based rates."[204]

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198 AT&T Crafton Aff. at paras. 26-27.

199 AT&T Carroll Aff., Ex. 9, Letter from W. Scott Schaefer, Vice President - Marketing, BellSouth, to William J. Carroll, AT&T (May 16, 1996).

200 Subsequent to its formal request for access and interconnection, in June 1996, AT&T submitted a proposed interconnection agreement with BellSouth. In negotiations concerning such agreement, AT&T maintains that it "continued to emphasize" its interest in ordering unbundled network elements as well as combinations of such elements. AT&T Carroll Aff. at para. 17.

201 AT&T Comments at 51-52.

202 AT&T Reply Comments at 27.

203 *Id.*

204 *Id.* at 27-28 (quoting Department of Justice Evaluation at 40-41).

75. It is evident from the circumstances presented in this proceeding that AT&T has made significant efforts to advance its entry strategy in South Carolina but its efforts have been hindered.[205] In particular, although the Eighth Circuit upheld the Commission's rule that, pursuant to the Act, unbundled network elements must be made available, individually and in combination at cost-based rates, and the Commission has held that unbundled network element entry is sufficient to satisfy the requirements of section 271(c)(1)(A), AT&T has been unable to provide local service in South Carolina through the use of unbundled network elements. More specifically, even under AT&T's arbitrated interconnection agreement, AT&T was, and still is, precluded from offering local exchange service through a combination of unbundled network elements unless AT&T agrees to pay for that combination of elements at the rate applicable to resold services, instead of the cost-based rates applicable to the purchase of network elements.[206]

76. Although we deny BellSouth's application on the grounds that it has failed to satisfy the requirements of section 271(c)(1), we proceed to evaluate BellSouth's application under the "generally offering" standard set forth in section 271(c)(2)(A)(i)(II) and also deny BellSouth's application on the grounds that it has failed to generally offer each of the competitive checklist items in section 271(c)(2)(B).

VI. CHECKLIST COMPLIANCE

A. "Generally Offering" Each Checklist Item

1. Introduction

77. To demonstrate checklist compliance under Track B, the BOC must show that it "generally offers" each checklist item pursuant to an SGAT.[207] Pursuant to section 271(c)(1)(B), a BOC meets the requirements for authorization to provide in-region interLATA service if it "generally offers to provide such access and interconnection [as described in section 271(c)(1)(A)]" pursuant to a statement of general terms and conditions approved or allowed to take effect by a state commission.[208] Under section 271(d)(3)(A)(ii), the Commission shall not approve a request for in-region, interLATA service unless the BOC demonstrates that, "with respect to access and interconnection generally offered pursuant to

[205] Along with the construction of new networks and resale, the use of unbundled elements of the incumbent's network is one of the three paths of entry contemplated by the Act. *Local Competition Order*, 11 FCC Rcd 15509.

[206] AT&T Carroll Aff. at para. 23.

[207] 47 U.S.C. §§ 271(c)(2)(B), 271(d)(3)(A)(ii).

[208] Under 47 U.S.C. § 252(f), a BOC may file with a state commission a "statement of the terms and conditions that such company generally offers within that state to comply with the requirements of section 251."

[an SGAT], such statement offers all of the items included in the competitive checklist . . . ." Thus, before examining BellSouth's showing on specific checklist items, we first must address what it means to "generally offer[ ]" to provide a checklist item under section 271(c)(2)(B). We conclude that a BOC "generally offers" to provide a checklist item if it makes that item available as a legal and practical matter, as discussed below.

78. As explained below, this conclusion is consistent with the standard set forth in the *Ameritech Michigan Order* for checklist items that have not been requested. In the *Ameritech Michigan Order*, the Commission addressed the meaning of "providing access and interconnection" pursuant to the competitive checklist as required under sections 271(c)(2)(A) and 271(d)(3)(A)(i) (*i.e.*, for Track A). Under these provisions, the BOC must show that it "is providing access and interconnection" and that it "has fully implemented the competitive checklist."[209] The Commission concluded that "a BOC 'provides' a checklist item if it actually furnishes the item at rates and on terms and conditions that comply with the Act."[210] Alternatively, the Commission concluded that, where no competitor is actually using the item, the BOC must show that it makes the checklist item available "as both a legal and practical matter."[211] To be "providing" a checklist item, "a BOC must have a concrete and specific legal obligation to furnish the item upon request pursuant to state-approved interconnection agreements that set forth prices and other terms and conditions for each checklist item."[212] In addition, the BOC must demonstrate that it is "presently ready to furnish each checklist item in the quantities that competitors may reasonably demand and at an acceptable level of quality."[213] Evidence of actual commercial usage of a checklist item is most probative, but a BOC may also submit evidence such as carrier-to-carrier testing, independent third party testing, and internal testing to demonstrate its ability to provide a checklist item.[214]

2. Discussion

79. Although parties that address the issue use somewhat different terminology to define "generally offer," parties seem to agree that to "generally offer" is consistent with a requirement to "make available." BellSouth asserts that it is "generally offering" the items in its SGAT because it "stands ready to furnish each item in the quantities that competitors may reasonably demand and at a level of quality that enables competitors to provide service on par

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209 47 U.S.C. §§ 271(c)(2)(A), 271(d)(3)(A)(i).

210 *Ameritech Michigan Order* at para. 110.

211 *Id.*

212 *Id.*

213 *Id.*

214 *Id.*

with BellSouth's."[215] It contends that the checklist items in the SGAT are "ready and waiting."[216] Before the South Carolina Commission, BellSouth contended that "generally offering" means "that when a competitor requests a checklist item, BellSouth will provide it within a reasonable period of time, in parity with the services provided for our own retail customers and in accordance with all applicable rules and regulations."[217] BellSouth argues that evidence of actual commercial usage and testing in other states demonstrates its ability to furnish checklist items upon request.[218] Similarly, the South Carolina Commission uses various phrases to define "generally offers," including "make available," "generally available," and "functionally available."[219] The South Carolina Commission concluded that, although approval of the SGAT does not require BellSouth to show that it is actually providing each checklist item, BellSouth has established that it has actually provided each item somewhere within its nine-state region.[220]

80. The Department of Justice employs the standard the Commission adopted in the *Ameritech Michigan Order*, asserting that, "[u]nder Track B, as well as under Track A, an applicant is required to show that each checklist item is available both as a legal matter and as a practical matter."[221] The Department of Justice contends that the phrase "statement of generally available terms" indicates that "checklist items must be *generally* offered to all interested carriers, be *generally* available, and be offered at concrete *terms*."[222] According to the Department of Justice, a "mere paper promise to provide a checklist item, or an invitation to negotiate, would not be a sufficient basis for the Commission to conclude that a BOC 'is generally offering' all checklist items."[223] Similarly, AT&T argues that a BOC must demonstrate that it is "able to actually provision" each checklist item.[224] MCI contends

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[215] BellSouth Application at 18-19.

[216] *Id.* at 17, 18.

[217] BellSouth Application, App. C, Vol. 3, Tab 58, Testimony of Alphonso J. Varner, BellSouth, South Carolina Commission Docket No. 97-101-C, July 7, 1997, 11:00 a.m. Hr'g, Tr. at 173.

[218] BellSouth Application at 35; *see also id.*, App. A, Vol. 3a, Tab 9, Affidavit of W. Keith Milner (BellSouth Milner Aff.) at para. 5.

[219] *South Carolina Commission Compliance Order* at 26, 31, 41, 44.

[220] *Id.* at 5-6, 26-27.

[221] Department of Justice Evaluation at 13.

[222] *Id.*

[223] *Id.*

[224] AT&T Comments at 8 (comparing Georgia Commission's statement that BellSouth's SGAT should not be approved so long as BellSouth has not demonstrated that it is able to actually provision the listed services).

similarly that BellSouth must demonstrate that it could provide each item "in the real world."[225] According to MCI, an "offer" must be more than just a recitation of the Act's requirements; it must include reasonable and nondiscriminatory terms and conditions as well as a reliable implementation procedure.[226]

81. We conclude that the phrase "generally offers to provide such access and interconnection" requires a BOC to make the checklist item available as both a legal and practical matter. The term "offer" is commonly understood to mean "make available."[227] The statute contemplates that, in a Track B application, a carrier may file even though no request has been made for any checklist item. Under Track B, the BOC must offer checklist items on terms such that a competitor may obtain these items if and when the competitor actually enters the local market. Thus, the standard for a Track B application is that the BOC must have a concrete and specific legal obligation to furnish the item upon request pursuant to its SGAT.[228] Moreover, the BOC must demonstrate that it is presently prepared to furnish each checklist item in the quantities that competitors may reasonably demand and at an acceptable level of quality.[229] The Commission must make a predictive judgment to determine whether a BOC is actually able to furnish the checklist item upon demand, and thus whether the item is legally and practically available. Where the BOC uses identical processes and systems for ordering and for furnishing items in a multistate region, evidence that a BOC actually is or is not capable of furnishing the item in another state would be probative of that BOC's ability to make the checklist item available as both a legal and practical matter in the state that is the subject of the application.[230] Alternatively, a carrier could demonstrate that an item is practically available through carrier-to-carrier testing, third-party testing, or internal testing. This is consistent with the Commission's conclusion, which we reaffirm, in the *Ameritech Michigan Order* for a Track A application that, where no party has actually requested an item, the Commission would consider whether the item is available as both a legal and practical

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[225] MCI Comments at 55.

[226] *Id.*

[227] Webster's II New College Dictionary 759 (1995); *see also South Carolina Commission Compliance Order* at 26.

[228] *Cf. Ameritech Michigan Order* at para. 110.

[229] *Cf. id.*

[230] According to BellSouth, its "processes are identical in all nine states for ordering, provisioning, maintaining and repairing and rendering a bill. Thus, BellSouth's provision of a given checklist item in one state is evidence of its functional availability in South Carolina." BellSouth Milner Aff. at para. 5. Because BellSouth "uses the same processes with respect to checklist items in all of its nine states, [BellSouth's] experience within and outside South Carolina confirms the practical availability of interconnection in South Carolina." BellSouth Application at 35.

matter.[231] For the reasons described below, we find that BellSouth does not "generally offer[ ] to provide" certain of the checklist items.

B. Operations Support Systems

1. Introduction

82. As discussed above, Congress requires incumbent LECs to share their networks with new entrants to hasten the development of competition in the local exchange market.[232] In order for a new entrant practically to have access to an incumbent LEC's network, the Commission has required, since adoption of the *Local Competition Order* in August 1996, that incumbent LECs offer nondiscriminatory access to the systems, information, and personnel that support those network elements or services.[233] These systems, databases, and personnel collectively are commonly referred to as operations support systems, or OSS.[234] The Commission has consistently found that nondiscriminatory access to the functions of operations support systems is integral to the ability of competing carriers to enter the local exchange market and compete with the incumbent LEC.[235] To compete effectively in the local exchange market, new entrants must be able to provide service to their customers at a quality level that matches the service provided by the incumbent LEC. A competing carrier that lacks access to operations support systems equivalent to those the incumbent LEC provides to itself, its affiliates or its customers, "will be severely disadvantaged, if not precluded altogether, from fairly competing."[236]

83. As the Commission decided in the *Ameritech Michigan Order*, section 271 requires the Commission to review the BOC's offer of access to operations support systems

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[231] *See Ameritech Michigan Order* at para. 110.

[232] *See supra* part II.B; *see also Ameritech Michigan Order* at para. 13; *Iowa Utils. Bd.*, 120 F.3d at 816 ("Congress clearly included measures in the Act, such as the interconnection, unbundled access, and resale provisions, in order to expedite the introduction of pervasive competition into the local telecommunications industry.").

[233] *Local Competition Order*, 11 FCC Rcd at 15499, 15767.

[234] *See Ameritech Michigan Order* at para. 129. We note that the Department of Justice, in its evaluation, uses the term "wholesale support processes," which it defines as "the automated and manual processes required to make resale services and unbundled elements, among other items, meaningfully available to competitors." Department of Justice Evaluation, App. A at 1. We believe the terms "operations support systems," as used by the Commission, and "wholesale support processes," as used by the Department of Justice, are the same. *See Ameritech Michigan Order* at para. 129.

[235] *Ameritech Michigan Order* at paras. 129-30; *see also Local Competition Order*, 11 FCC Rcd at 15763; *Local Competition Second Reconsideration Order*, 11 FCC Rcd at 19741-43.

[236] *Local Competition Order*, 11 FCC Rcd at 15763-64.

functions and to verify that a section 271 applicant is meeting its obligation to offer nondiscriminatory access to OSS functions.[237] As the Commission determined in the *Local Competition Order*, the provision of access to OSS functions falls squarely within an incumbent LEC's duty under section 251(c)(3) to provide unbundled network elements under terms and conditions that are nondiscriminatory and just and reasonable, and its duty under section 251(c)(4) to offer resale services without imposing any limitations or conditions that are discriminatory or unreasonable.[238] Thus, as the Commission concluded in the *Ameritech Michigan Order*, "[b]ecause the duty to provide access to network elements under section 251(c)(3) and the duty to provide resale services under section 251(c)(4) include the duty to provide nondiscriminatory access to OSS functions, an examination of a BOC's OSS performance is necessary to evaluate compliance with section 271(c)(2)(B)(ii) and (xiv)."[239]

84. Moreover, the duty to provide nondiscriminatory access to OSS functions is embodied in other terms of the competitive checklist as well.[240] As discussed above, the duty to "offer" items under the checklist requires a BOC to make the item available as both a legal and practical matter, at rates and on terms and conditions that comply with the Act.[241] Thus, as the Commission stated in the *Ameritech Michigan Order*, in order for a BOC to be able to demonstrate that it is offering the items enumerated in the checklist (*e.g.*, unbundled loops, unbundled local switching, and unbundled local transport), it must demonstrate, *inter alia*, that it is offering nondiscriminatory access to the systems, information, and personnel that support those elements or services.[242] An examination of a BOC's OSS performance is therefore integral to our determination whether a BOC is offering all of the items contained in the competitive checklist.[243]

85. Although not expressly stated in the *Ameritech Michigan Order*, we conclude that an additional reason that we must undertake a review of the BOC's offer of access to OSS functions is that, as determined in the *Local Competition Order*, "operations support systems and the information they contain fall squarely within the definition of 'network

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[237] *Ameritech Michigan Order* at para. 131.

[238] *Local Competition Order*, 11 FCC Rcd at 15660-61, 15763; *Local Competition Second Reconsideration Order*, 11 FCC Rcd at 19742-43.

[239] *Ameritech Michigan Order* at para. 131. Section 271(c)(2)(B)(xiv) requires section 271 applicants to demonstrate that "[t]elecommunications services are available for resale in accordance with the requirements of sections 251(c)(4) and 252(d)(3)." 47 U.S.C. § 271(c)(2)(B)(xiv).

[240] *Ameritech Michigan Order* at para. 132.

[241] *See supra* para. 81.

[242] *See Ameritech Michigan Order* at para. 132.

[243] *Id.*

element.'"[244] The Eighth Circuit affirmed the Commission's determination that operations support systems are network elements that must be provided pursuant to section 251(c)(3) of the Act.[245] Section 271(c)(2)(B)(ii), item (ii) of the competitive checklist, expressly requires a BOC to offer "nondiscriminatory access to network elements in accordance with the requirements of sections 251(c)(3) and 252(d)(1)." Therefore, our section 271 review necessarily requires us to determine whether BellSouth offers nondiscriminatory access to OSS functions.

86. BellSouth claims that it is providing nondiscriminatory access to its operations support systems, stating that "[competing LECs] are able to perform traditional OSS functions such as pre-ordering, ordering, provisioning, maintenance and repair, and billing 'in substantially the same time and manner' as BellSouth."[246] In response, numerous parties argue that BellSouth has failed to satisfy various aspects of the requirement that it provide nondiscriminatory access to its operations support systems, raising issues with respect to each of the categories of OSS functions: pre-ordering, ordering, provisioning, repair and maintenance, and billing.

87. As discussed below, we conclude that BellSouth has failed to demonstrate that it offers to competing carriers nondiscriminatory access to OSS functions, as required by the competitive checklist. First, we outline the general approach to analyzing the adequacy of a BOC's operations support systems that the Commission adopted in the *Ameritech Michigan Order*. Second, we briefly describe BellSouth's operations support systems. Third, we analyze the evidence concerning competing carriers' access to OSS functions for resale services and unbundled network elements.

88. Based on the evidence in the record, we conclude that BellSouth has not demonstrated that the access to certain OSS functions that it provides to competing carriers for pre-ordering, ordering, and provisioning of resale services and pre-ordering of unbundled network elements is equivalent to the access it provides to itself.[247] Although not a basis for our decision, we also address certain other concerns raised in the record concerning OSS access for ordering and provisioning of unbundled network elements. Given our finding that BellSouth fails to provide nondiscriminatory access to certain critical OSS functions for pre-ordering, ordering, and provisioning, we need not decide in this Order whether BellSouth complies with its obligation to provide nondiscriminatory access to every OSS function.

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[244] *Local Competition Order*, 11 FCC Rcd at 15763.

[245] *Iowa Utils. Bd.*, 120 F.3d at 808-09.

[246] BellSouth Application at 21.

[247] Although parties also raise issues related to OSS functions for repair and maintenance and billing, we limit our discussion to pre-ordering, ordering, and provisioning, because the record was more developed with respect to these issues.

Accordingly, as in the *Ameritech Michigan Order*, given the statutory 90-day time deadline, we include here a discussion of only certain issues raised in the context of this application and do not make any conclusions with respect to other OSS functions not addressed in this decision.[248] Nonetheless, to provide guidance for future applications, we highlight a number of other OSS-related issues that we do not reach as a decisional basis, but which raise concerns. We note that some of the issues we discuss in this section have already been addressed by the Commission in the *Ameritech Michigan Order*.

89. We recognize that BellSouth has devoted substantial resources to deploying systems that allow competing carriers to access OSS functions. Nevertheless, to compete effectively in the local exchange market, new entrants must be able to provide telecommunications services to their customers at a quality level that matches the service provided by the incumbent LEC. For example, if new entrants are unable to process orders as quickly and accurately as the incumbent, they may have difficulty marketing their services to end-users. Each of the issues that we discuss below as a basis for our decision has a significant impact on a new entrant's ability to serve its customers. Moreover, the impact of these deficiencies is magnified when they are viewed collectively. Given these deficiencies, from an end-user's perspective, interactions with a new entrant will take longer and be more prone to errors than interactions with BellSouth, through no fault of the new entrant. As a result, the new entrant's reputation may suffer, even though problems that customers encounter with the new entrant are due to the type of access to OSS functions that BellSouth offers.

2. Description of BellSouth's Operations Support Systems

90. BellSouth has established two Local Carrier Service Centers (LCSCs), one in Atlanta, Georgia, and one in Birmingham, Alabama, that serve as the central contact points with BellSouth for new entrants for pre-ordering, ordering, and provisioning of resale services and network elements.[249] Each new entrant is assigned to one LCSC to handle its needs for the entire BellSouth region.[250] Thus, for example, a new entrant assigned to the Birmingham LCSC would interact with that LCSC for services it provides to customers in South Carolina, Florida, Georgia, or any other state in BellSouth's region. The LCSC will accept facsimile, telephone, or mail requests from those new entrants that do not want to implement one of the

[248] *Ameritech Michigan Order* at para. 128.

[249] BellSouth Application, App. A, Vol. 5, Tab 13, Affidavit of William N. Stacy (BellSouth Stacy Performance Measures Aff.) at para. 4.

[250] *Id.* The Atlanta center supports "AT&T, MCI, OPC, Intermedia, Nextlink and Georgia Comm South." All other carriers are handled by the Birmingham Center. *Id.*